

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WILLIAM JEFFERSON,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant-Appellee.

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UNPUBLISHED

October 23, 2014

No. 317254

Wayne Circuit Court

LC No. 10-004415-NF

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this action to recover no-fault benefits, plaintiff appeals by right from the trial court's order dismissing plaintiff's complaint with prejudice for failure to comply with the court's final pretrial order. We affirm.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

Plaintiff was involved in an automobile accident in 2009. On April 14, 2010, plaintiff filed suit for payment of personal protection insurance (PIP) benefits pursuant to an insurance policy issued by defendant. Defendant denied the allegations and raised various affirmative defenses.

On August 3, 2010, defendant filed a motion to compel discovery. Defendant alleged that plaintiff failed to respond to defendant's first set of interrogatories and requests for production of documents. It further claimed that plaintiff's answers to defendant's requests for admission were deficient because plaintiff did not answer the subparts of the requests. Finally, plaintiff allegedly failed to respond to defendant's request for authorizations to obtain plaintiff's medical records and records from the Social Security Administration. Defendant asserted the inability to schedule depositions and prepare its defense because of plaintiff's failure to participate in discovery. Therefore, defendant requested costs and sanctions incurred for filing the motion to compel. The record does not contain any indication that plaintiff answered defendant's motion. On August 13, 2010, the trial court issued an order compelling plaintiff to respond to defendant's requested discovery and to execute the necessary medical authorizations by August 20, 2010.

On September 13, 2010, defendant filed a motion to dismiss for failure to comply with the August 13, 2010 order. Defendant alleged that plaintiff's counsel failed to appear at the hearing on its motion to compel, and the trial court granted the motion. Although the order compelling discovery required plaintiff to produce discovery and medical authorizations, plaintiff purportedly failed to submit all of the outstanding discovery or the medical authorizations. Defense counsel alleged that he notified plaintiff's counsel of the deficiencies on August 24, 2010, but did not receive a response or correspondence. In light of what defendant characterized as plaintiff's willful noncompliance, defendant argued that dismissal of the action was warranted, with costs and attorney fees to be awarded to defendant. Alternatively, defendant requested entry of an order requiring compliance with the prior court order within seven days. Again, the record contains no indication that plaintiff answered this motion. The trial court granted the motion in part, ordering plaintiff to comply with the outstanding discovery requests and to appear for deposition by October 22, 2010.

On December 2, 2010, defendant filed yet another motion to compel discovery responses and medical authorizations. Defendant requested a medical authorization for Dr. Sonnora Johnson-Reed on October 5, 2010, and reminded plaintiff's counsel of the outstanding request in correspondence on November 5, 2010. On October 15, 2010, defendant served plaintiff's counsel with interrogatories that were not answered. Additional medical authorizations were served on November 10, 2010, but also went unanswered. There is no indication in the lower court record that plaintiff filed a response to this motion to compel. An order issued on December 9, 2010 provides that the motion was dismissed; the lower court docket entries indicate that a stipulated order compelling discovery was signed by the court on December 13, 2010, but no such order is contained in the lower court file.

The trial was adjourned by stipulation, following plaintiff's request, on May 11, 2012. Plaintiff had been recently admitted to an inpatient mental institution and was not expected to be discharged by the date of trial. Furthermore, plaintiff's counsel had another trial scheduled on that date. The parties stipulated to stay the trial date, for a protective order of medical information, and for plaintiff to provide within seven days the name and location of the facility where plaintiff was admitted for treatment.

On February 22, 2013, plaintiff filed a motion to lift the stay and for a status conference. Plaintiff asserted that the case had been stayed because of plaintiff's admission to a mental hospital, and that after his discharge, plaintiff was incarcerated until September 2012. There were no physical or legal barriers to prevent plaintiff from participating in his trial. Plaintiff agreed to provide defendant with authorizations to obtain his updated medical records when the stay was lifted. On March 1, 2013, defendant filed a response, agreeing to lift the stay and schedule a status conference, but sought discovery of the location where plaintiff was treated and updated medical authorizations. On March 13, 2013, the trial court<sup>1</sup> issued an order lifting the stay, scheduled a settlement conference for March 20, 2013, re-opened the discovery period until

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<sup>1</sup> The original trial judge, Judge Prentis Edwards, had at this point been replaced by Judge David Allen.

May 3, 2013, and required plaintiff to produce information about additional medical providers as well as execute medical authorizations.

On April 2, 2013, defendant filed yet another motion to dismiss for failure to comply with the court order requiring plaintiff's disclosure of medical providers and facilities with accompanying medical authorizations. Defendant argued that the court rules permit dismissal of an action for failure to comply with a court order, and that the factors favored dismissal because plaintiff had a history of refusing to participate in discovery. Alternatively, defendant sought an order to show cause why plaintiff should not be held in contempt for failure to comply with the March 13, 2013 order. Finally, defendant requested costs, attorney fees, and sanctions because the motion had to be filed due to plaintiff's noncompliance with discovery. Again the record contains no indication that plaintiff responded to this motion. This motion was dismissed following a hearing on April 12, 2013; no transcript of that hearing appears in the record.

The trial court issued an order regarding a settlement conference on May 1, 2013. This order scheduled the trial date for June 24, 2013. It also scheduled a final settlement conference for May 22, 2013, with counsel for plaintiff ordered to appear with "actual verifiable numbers for settlement negotiations or this matter is dismissed." The parties appear to agree that at the settlement conference, the trial court set the deadline for the filing of a final joint pretrial order and promulgated and distributed to the parties a document entitled "Final Pretrial Order" which set forth in detailed paragraphs the court's requirements for the preparation and content of a joint final pretrial order, and its rules governing the conduct of trials, and which stated in relevant part:

17. THIS ORDER CONSTITUTES A DULY ENTERED ORDER OF THIS COURT, AND FAILURE TO COMPLY STRICTLY WITH ALL ITS TERMS, MAY RESULT IN DISMISSAL, STRIKING OF ANSWERS AND AFFIRMATIVE DEFENSES, ENTRY OF DEFAULT, DEFAULT JUDGMENT, REFUSAL TO LET WITNESSES TESTIFY, REFUSAL TO ADMIT EXHIBITS, OR OTHER ACTION, INCLUDING THE ASSESSMENT OF SPECIAL COSTS AND EXPENSES, INCLUDING ACTUAL ATTORNEY FEES.

According to the trial court's order<sup>2</sup>, plaintiff was responsible for compiling and filing the joint final pretrial order seven days before trial. Five days before trial, defendant filed an emergency motion to dismiss because plaintiff had failed to meet the requirements of the court's order and because plaintiff could not establish the prima facie elements of his claim without expert testimony.

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<sup>2</sup> It is unclear from the record whether this pretrial order was signed and formally entered by the trial court into the record. The register of actions only indicates that a settlement conference was held on May 22 and May 23, 2013. However, it appears uncontested that it was distributed to the parties at the final settlement conference, and plaintiff does not argue that it lacks force or effect.

On June 24, 2013, on the morning scheduled for a jury trial in the matter, trial court heard oral argument on the motion to dismiss. The trial court noted that its pretrial order explicitly stated that failure to strictly comply may result in dismissal, and that plaintiff had failed to comply with the order; specifically, plaintiff filed the joint final pretrial order on the very day of trial (rather than a week earlier as required), failed to provide defense counsel with a draft of the joint final pretrial order until a mere one business day prior to the date on which it was required to be filed with the court, and failed to provide the requisite number of copies of the final pretrial order or to provide the court with “binders and exhibits and copies and jury instructions.” The trial court further noted that the amount of damages had changed dramatically over three years of litigation—at the time of the hearing on defendant’s motion the damages had gone from over \$60,000 to a \$620 ambulance bill. Plaintiff’s counsel acknowledged at the hearing that the trial court had informed him that failure to strictly comply with the pretrial order could result in dismissal. The trial court dismissed the case with prejudice. This appeal followed.

## II. STANDARD OF REVIEW

The trial court’s dismissal of a case for failure to comply with a court order is reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A decision constitutes an abuse of discretion when it falls outside the range of reasonable and principled outcomes. *Holman v Rasak*, 486 Mich 429, 448 n 10; 785 NW2d 98 (2010).

## III. ANALYSIS

“The trial court’s front-line responsibility for the administration of justice mandates the potential use of sanctions for delay.” *North v Dep’t of Mental Health*, 427 Mich 659, 661-662; 397 NW2d 793 (1986). The court’s authority to impose severe sanctions is necessary to penalize conduct that warrants such a sanction and to act as a deterrent to prevent others from engaging in such conduct. *Id.* at 662. Although a trial court clearly has the authority to exercise the most drastic sanction of dismissal with prejudice, such a measure should be exercised cautiously. *MacArthur Patton Christian Ass’n v Farm Bureau Ins Group*, 403 Mich 474, 477; 270 NW2d 101 (1978).

Before imposing the drastic sanction of dismissal, “the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper.” *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). In *Vicencio*, this Court summarized the following factors the trial court should consider before imposing the sanction of dismissal:

(1) whether the violation was wilful [sic] or accidental; (2) the party’s history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court’s orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Id.* at 507 (citation omitted).]

A trial court may abuse its discretion when it fails to evaluate other options short of dismissal on the record. *Id.* at 506-507.

Under the circumstances presented, we conclude that the trial court did not abuse its discretion and adequately considered the *Vicencio* factors. The trial court noted that plaintiff was aware of the trial court's requirements, as set forth in the pretrial order, and was aware that he risked dismissal through non-compliance, suggesting that the court viewed plaintiff's violation as willful. The trial court was aware that plaintiff had failed to comply with numerous discovery orders. The trial court further characterized plaintiff's submission of a proposed pretrial order to defendant after close of business on Friday, when it was due to the court the following Monday, as "sandbagging," indicating that the trial court not only viewed this conduct as willful (and perhaps indicative of a history of deliberate delay) but that this conduct prejudiced defendant. Finally, the trial court stated as follows:

Okay. The Court's had an opportunity to review the motion, the argument.

The Court notes for the record I'd just gotten a joint final pretrial order this morning.

My pretrial order, which I put everybody on notice, indicates quite clearly the first paragraph, the first sentence of the 1<sup>st</sup> paragraph, "It is the responsibility of Plaintiff's counsel to prepare the final pretrial order and present one copy to each opposing counsel and two copies, court file, judge's copy, to this Court no later than seven days prior to the trial date", that's not been done.

The Court indicates that it needed binders and exhibits and copies and jury instructions, we've got none of that.

Paragraph 17, if my instructions to counsel weren't explicit enough it's here in bold, it's in caps, and it says, "This order constitutes a duly entered order of this Court and failure to comply strictly with all its terms may result in dismissal, striking of answers and affirmative defenses, entry of default", it goes on and on.

And this is a case that looks to be poorly put together, and that's being kind.

We've got numbers, within the span of a week we've gone from 47 to 3700 to 600 - - 6800 to \$625, I mean that number should've been crystal clear years ago, months ago, weeks ago.

Numbers are changing at the last minute. I mean I'm not going to do people's jobs for them, I'm going to do my job and I was crystal clear.

The Court's going to dismiss the matter with prejudice.

We hold that the above statement from the trial court indicates that it had considered whether a lesser sanction would serve the interests of justice, and had concluded, in light of the

history of the case, which included constantly-changing claims for damages, numerous violations of discovery orders, and the “sandbagging” of defendant, that no lesser sanction at that juncture would suffice. The trial court had entered numerous prior discovery orders reflecting an effort by the court to achieve compliance with the court’s orders short of dismissing plaintiff’s case. The trial court’s requirements, as set forth in pretrial order on which the trial court ultimately relied in dismissing plaintiff’s case, are consistent with Michigan law, providing for various methods of obtaining compliance, including the ultimate sanction of dismissal. Plaintiff was well aware that he risked dismissal by not complying. The trial court had granted plaintiff a great deal of leniency in the earlier portion of the case by not ordering dismissal in response to plaintiff’s numerous discovery deficiencies and violations of its orders. To hold, as plaintiff requests, that the trial court abused its discretion by failing to explicitly state and reject every sanction short of dismissal, on the morning of trial when considering the last of many motions resulting from plaintiff’s repeated noncompliance, would be to essentially require trial courts to recite “magic words” before dismissing a case for noncompliance, regardless of the history of the party’s noncompliance or the lesser sanctions or opportunities previously afforded by the trial court to achieve compliance. We decline to limit the trial court’s exercise of its inherent power to penalize noncompliance with its orders in such a fashion. *North*, 427 Mich at 661-662.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly